BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DAVID E. HICKS	)	
Claimant	)	
VS.	)	
	)	Docket No. 228,851
LABOR READY	)	
Respondent	)	
AND	)	
	)	
GATES McDONALD	)	
Insurance Carrier	)	

ORDER

Respondent appeals the December 17, 1999, Award of Administrative Law Judge Julie A. N. Sample. The Award granted claimant a 100 percent permanent partial disability to the right eye based upon the opinions of Henry J. Isern, M.D., and the independent medical examination report of W. B. Spalding, Jr., M.D. Oral argument before the Board was held on May 24, 2000.

APPEARANCES

Claimant appeared by his attorney, Robert W. Harris of Kansas City, Kansas. Respondent and its insurance carrier appeared by their attorney, Michael D. Streit of Wichita, Kansas.

RECORD AND STIPULATIONS

The record and stipulations set forth in the Award of the Administrative Law Judge are adopted by the Appeals Board for the purposes of this award.

ISSUES

(1) Did the Administrative Law Judge commit reversible error in appointing an independent medical physician both after the regular hearing was concluded and after the parties had filed their submittal briefs without allowing the parties the opportunity to cross-examine the doctor?

(2) What, if any, is the nature and extent of claimant's injury and/or disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant was injured on November 11, 1997, when a steel band broke, striking him in the right eye. Claimant underwent surgery to repair the laceration to the eye and later, on March 18, 1998, had an intraocular lens implanted in the right eye. Henry J. Isern, M.D., an ophthalmologist, performed both procedures and has provided claimant with post-surgery medical care.

As a result of that accident and surgery, claimant has a corneal scar, which causes blurred vision, dizziness, headaches and a burning sensation upon awakening in the morning, which interferes with his central vision and causes his eye to tear frequently. With corrective lenses, claimant's visual acuity is 20/40. However, without eyeglasses, his vision in his right eye tests at 20/400. This results in claimant being industrially blind without corrective vision glasses.

Dr. Isern testified that claimant suffered a 100 percent loss of his right eye. This opinion was not provided pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition, as is required by K.S.A. 1997 Supp. 44-510e. Dr. Isern, instead, used a form entitled "Physician's Report" which is provided by the Division of Workers Compensation, Department of Human Resources. On the back of this form is a chart which measures a claimant's quantitative visual acuity. This form, while being provided by the Division of Workers Compensation, does not comply with the specific requirements contained in the AMA Guides.

Dr. Isern was cross-examined by respondent's attorney regarding his failure to use the AMA Guides. He testified that, while being familiar with the AMA Guides, he did not use them in this instance but, instead, simply used the form in assigning the impairment. Dr. Isern also admitted that he did not test claimant's field of vision or his extraocular muscular function before rendering his functional impairment opinion. Nevertheless, Dr. Isern felt claimant had suffered a 100 percent loss of the eye as computed on the visual acuity chart.

This matter went to regular hearing on March 4, 1999. At that time, terminal dates were set with claimant's on April 8, 1999, and respondent's on May 10, 1999. Both parties submitted their cases in a timely fashion.

Thereafter, the Administrative Law Judge, upon her own recommendation, reopened the record and referred claimant to W. B. Spalding, Jr., M.D., for an independent medical examination of the eye. The Administrative Law Judge did not specify why she took this

action, but it was argued by respondent that it was done in order to provide an admissible opinion regarding claimant's functional impairment. Respondent argued that the failure by Dr. Isern to use the AMA Guides rendered his opinion invalid.

This independent medical examination opinion was ordered over respondent's strong objections at the June 3, 1999, hearing.

The examination was initially set for August 3, 1999, but claimant was unable to attend and the examination was moved to and completed on September 7, 1999. In a letter to respondent's attorney dated October 12, 1999, Dr. Spalding's office advised that an additional $150 was still due and owing for the examination. The letter indicated that the full report would not be provided until the bill was paid in full. Sometime after that, the $150 was apparently paid, although the record is silent as to when. The report from Dr. Spalding was faxed to the Administrative Law Judge on December 8, 1999. The fax transmittal letter gives no indication whether the report was provided to the parties. The fax transmittal letter shows only the Administrative Law Judge as the recipient. The Award by Judge Sample was issued December 17, 1999.

Respondent objected to the inclusion of Dr. Spalding's opinion, arguing that the Administrative Law Judge exceeded her jurisdiction in reopening the record and appointing Dr. Spalding to perform an independent medical examination after the regular hearing and after all terminal dates had run. Respondent argued this is a denial of due process, having deprived respondent of the opportunity to cross-examine the medical expert.

It has long been the law in workers compensation that the administrative law judge is not bound by the technical rules of procedure, but shall give the parties reasonable opportunity to be heard and to present evidence, insure the employee and the employer an expeditious hearing and act reasonably without partiality. Bahr v. Iowa Beef Processors, Inc., 8 Kan. App. 2d 627, 663 P.2d 1144, *rev. denied* 233 Kan. 1091 (1983); K.S.A. 1999 Supp. 44-523. In fact, any procedure which is appropriate and not prohibited by the Workers Compensation Act may be employed by the administrative law judge. Bushey v. Plastic Fabricating Co., 213 Kan. 121, 515 P.2d 735 (1973).

In this instance, the Administrative Law Judge ordered the independent medical examination under K.S.A. 1997 Supp. 44-510e. But she also stated at the hearing that the independent medical examination would have been appropriate under K.S.A. 44-516 as well.

A fact situation similar to this was presented to the Board in Sapata v. Southwestern Bell Telephone Company, WCAB Docket No. 133,971 (Jan. 1997). In Sapata, the assistant director selected Peter V. Bieri, M.D., to evaluate claimant for the purposes of a review and modification proceeding. This request was made approximately nine months after the record was closed and the parties had submitted their case for decision. Before

either party had the opportunity to respond to Dr. Bieri's findings, the assistant director issued an award, in part, utilizing Dr. Bieri's opinion. In that instance, the Board found that the assistant director, in effect, reopened the record upon his own initiative to receive additional evidence without extending the parties' terminal dates or otherwise giving the parties and opportunity to respond to the new evidence.

K.S.A. 44-516 allows the director, in the director's own discretion, to refer claimant for an independent medical examination. The Board found in Sapata that this procedure was appropriate. However, the Board went on to hold that once the record is reopened, K.S.A. 44-523 dictates that the parties shall be given a reasonable opportunity to respond to the new evidence.

In this instance, while the examination by Dr. Spalding was held in September, the record indicates the first time Dr. Spalding's report was released was when it was faxed to the Administrative Law Judge on December 8, 1999. There is no indication either of the parties received a copy of this report prior to the Administrative Law Judge's Award being issued on December 17, 1999. The Appeals Board finds that, while the Administrative Law Judge had the right to reopen the record, the Administrative Law Judge should have given the parties the opportunity to respond to and, if necessary, rebut the evidence.

The reliance by the Administrative Law Judge on ex parte investigations or examinations violates their due process by not giving the parties an opportunity to respond.

> The basic right to confront, cross-examine, and refute must be respected. . . . Under the increasingly common practice of referral of the claimant to an official medical examiner or an independent physician chosen by the Commission, it is particularly important that commissions not lose sight of the elementary requirement that the parties be given an opportunity to see such doctor's report, cross-examine the doctor, and if necessary provide rebuttal testimony. 7 Larson's Workers' Compensation Law, § 127.05[4] (2000).

The Appeals Board is mindful of the Kansas Supreme Court decisions in both Baker v. St. Louis Smelting & Refining Co., 145 Kan. 273, 65 P.2d 284 (1937), and Burns v. Topeka Fence Erectors, 174 Kan. 136, 254 P.2d 285 (1953). However, in both Baker and Burns, the parties were given the opportunity to cross-examine the independent medical examination doctor prior the issuance of the decision by the then Workers Compensation Commissioner, thus protecting their due process rights. In this instance, the opportunity to cross-examine the independent medical examination doctor was never afforded the parties prior to the issuance of the decision.

The Appeals Board finds that the Administrative Law Judge's decision to reopen the record was proper and well within her jurisdiction. However, her consideration of the report without providing the parties an opportunity to cross-examine and refute the evidence was

a denial of due process. The Appeals Board, therefore, finds this matter should be remanded to the Administrative Law Judge with instructions to reopen the record and allow the parties the opportunity to examine the doctor regarding his opinions and, if desired by either party, provide evidence to rebut the doctor's medical opinion.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Julie A. N. Sample dated December 17, 1999, should be, and is hereby, remanded to the Administrative Law Judge with instructions to reopen the record in accordance with the above findings.

IT IS SO ORDERED.

Dated this ____ day of July 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

In this situation, I disagree with remanding the case to the Administrative Law Judge. At oral argument to the Appeals Board, respondent's counsel indicated that respondent had no additional evidence to present to the Judge for adjudicating this claim. Therefore, the Judge's failure to permit respondent an opportunity to cross-examine Dr. Spalding or to present rebuttal evidence is harmless error.

I would affirm the Award.

BOARD MEMBER

c: Robert W. Harris, Kansas City, KS
Michael D. Streit, Wichita, KS
Julie A. N. Sample, Administrative Law Judge
Philip S. Harness, Director